

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. R-01/10-14  
 )  
 Appeal of )

The petitioner appeals the decision by the Department for Disabilities, Aging, and Independent Living (DAIL) denying part of his request for variances to increase his services under the Choices for Care (CFC) program. The issue is whether the petitioner has shown that he meets the criteria for the requested variances. The following decision is based upon the written record and the representations of counsel at an abbreviated hearing held on April 29, 2010.

1. The petitioner is a ninety-one-year-old man who lives with his daughter, who is his primary caregiver. His daughter is an R.N. The petitioner's medical conditions include arthritis, stroke, dementia, hemiplegia (paralysis), and chronic swallowing and reflux problems.

2. The petitioner applied for CFC when he returned home from a hospitalization in August 2009. The petitioner requested personal care services totaling 144 hours every two

weeks. Included in the petitioner's request for services were several "variances" over and above the usual maximums granted under Department policy. In October, 2009 the Department found him eligible for personal care services totaling 114 hours every two weeks. That decision was upheld by the Commissioner of DAIL in a review decision dated December 16, 2009.

3. In this appeal the parties have orally stipulated and acknowledged that the only remaining issues in the case concern the Department's denial of variances for additional hours of personal care in the categories of "mobility" and "eating".

4. At the hearing that was convened on April 29, 2010 the Department conceded that it had no direct evidence disputing the partial testimony and representations of the petitioner's daughter that in addition to 15 minutes per day spent moving the petitioner around in his wheelchair, she spends twenty minutes four times per day (80 minutes total) doing range of motion exercises with the petitioner so that his limbs won't tighten and become atrophied. At no time has the Department alleged that these exercises are not medically necessary in terms of frequency and duration.

5. At the hearing the Department also indicated that it did not have any direct evidence contradicting the partial testimony and representations of the petitioner's daughter that it is medically necessary for the petitioner's caregivers to carefully supervise and monitor his tube feeding to prevent him from aspirating, and that the time they spend feeding and monitoring him is 120 minutes per day.

6. Neither at nor after the hearing did the Department dispute the hearing officer's oral observation that the petitioner's daughter appeared to be a credible witness who was knowledgeable about the petitioner's medical needs and condition.

7. In his application for CFC the petitioner requested a variance under "mobility" for a total of 95 minutes a day for moving the petitioner's wheelchair (15 min.) and doing his range of motion exercises (80 min.). In its Commissioner Review decision the Department ruled as follows regarding this request:

. . . Choices for Care does not pay for ROM exercises as a separate category or as part of the mobility category. Those exercises should be done throughout the day when other activities are taking place. Nonetheless, the Department understands the difficulties attendant to your father's stroke and therefore awarded you 50 minutes/day for mobility, though the maximum time without a variance is 30 minutes/day.

At the hearing, and in its written arguments filed June 8, 2010, the Department essentially reiterated the above position.

8. There is no allegation by the Department or indication in the record that any time for range of motion exercises for the petitioner was considered or allocated under any other category of activities of daily living for which he requires assistance.

9. In his application for CFC the petitioner also requested a variance under "eating" for a total of 120 minutes a day to reflect the time his caregivers spend monitoring his food intake to avoid aspiration. In its Commissioner's Review decision the Department ruled as follows regarding this request:

You stated that your father is given six cans/day of tube feeding, and that each gravity feed frequently stops and needs to be adjusted. You also noted that half of your father's stomach has been removed, which means he has less room for the food and an increased likelihood of aspiration. The maximum time for feeding without a variance is 45 minutes/day. Your father was granted an additional 15 minute variance, for a total of 60 minutes/day. Although you may not agree with this decision, Choices for Care does not pay for monitoring feeding tubes, but rather only the act of providing the food. . . .

In its written arguments the Department characterizes the monitoring of the petitioner for aspiration during his

food intake as "supervision", which it maintains is not a covered service under CFC.

10. The Department characterizes the partial variances it granted the petitioner for mobility and eating (as well as for some other areas, which are not in dispute) as an attempt to "compromise with the family". There is no allegation or indication in the record, however, that the Department awarded the petitioner any time for any activity of daily living above and beyond what his caregivers actually spend and which are medically necessary.

11. In his written submissions the petitioner maintains that he is prepared to submit more testimony regarding the details of his condition and his need for services. There is no indication in the record, however, that any of this testimony would be disputed by the Department or that it had (or would have) any bearing on its decision in this matter.

ORDER

DAIL's decision is reversed, in that the petitioner shall be granted the variances he requested for mobility and eating.

REASONS

As the Board has previously noted, the Choices for Care (CFC) program is a Medicaid waiver program that allows individuals who need nursing home level of care the choice whether to remain in their own home or enter a nursing home. As a Medicaid program, the CFC program is a remedial program whose provisions are to be liberally construed. Christy v. Ibarra, 826 P.2d 361 (Court of Appeals Co. 1991).

The general policy of the CFC program "shall be based on person-centered planning, and shall be designed to ensure quality and to protect the health and welfare of the individuals receiving services." CFC 1115 Long-term Care Medicaid Waiver Regulations (CFC Regulations) Section I.A. As a result, each individual's case turns on information specific to the individual.

Once an individual is found eligible, the individual is assessed to determine his level of need for services. CFC Regulations Sec. VII.B. The individual's case manager submits an Independent Living Assessment (ILA) to DAIL. The ILA includes a personal care worksheet that addresses the level of care and time requested for each ADL and for two IADLs (meal preparation and medication management); the remaining IADLs are aggregated.

The ILA lists maximum time limits for each ADL depending on the level of need. Recognizing that the program maximums may not meet an individual's needs, the regulations set out guidelines for requesting a variance. CFC Regulations Sec. XI.

The criteria for variance requests are found at CFC Regulations Sec. XI which states:

A. The Department may grant variances to these regulations. Variances may be granted upon determination that:

1. The variance will otherwise meet the goals of the Choices for Care waiver; and
2. The variance is necessary to protect or maintain the health, safety or welfare of the individual. The need for a variance must be documented and the documentation presented at the time of the variance request.

. . .

C. Variance requests shall be submitted in writing, and shall include:

1. A description of the individual's specific unmet need(s);
2. An explanation of why the unmet need(s) cannot be met; and
3. A description of the actual/immediate risk posed to the individual's health, safety or welfare.

In this case the parties agree that the petitioner is severely disabled and needs total assistance for his ADLs.

The parties also agree that petitioner needs variances, but they disagree as to the scope of specific variances. In cases where a requested variance increase is denied the burden of proof is on the petitioner to show that DAIL abused its discretion in denying the particular variance requested. The regulation allowing a variance is permissive in contrast to regulations in which an individual is eligible for a service if he meets certain criteria. If there has been an abuse of discretion, the issue becomes whether the individual has shown by a preponderance of the evidence that he meets the underlying criteria in the variance regulation. The Board has held (see *infra*) that an abuse of discretion can occur when the Department does not take into account the law and facts in a particular matter or is not consistent in applying facts and regulations across cases.

In this case the Department has based its denials solely on *legal* positions that are unsustainable. As the petitioner correctly points out, the Board has considered at least three prior cases in which variances were granted under mobility specifically to allow for range of motion exercises. See Fair Hearing Nos. B-01/09-45, A-07/09-404, and 20,798. (In the latter case, which was decided on other grounds, it appears that DAIL itself had included range of motion



exercises as ground for a variance under mobility.) In light of the above rulings, and inasmuch as there is no factual dispute in this matter that the petitioner's caregivers provide him with 80 minutes a day of medically necessary range of motion exercises, it must be concluded that DAIL's categorical denial of a variance for range of motion exercises must be reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

Similarly, DAIL's denial of a variance for the additional time the petitioner's care provider's must spend monitoring him for aspiration during his feeding is based solely on an untenable categorization of this activity as simply "supervision". The petitioner has proffered uncontroverted evidence that his medical condition makes it particularly difficult to feed him properly and that because he is at a particularly high risk of aspiration he requires a particularly high level of attention and vigilance during feeding. Based on that evidence it must be concluded that the petitioner fully meets the medical necessity and risk provisions of the Department's regulations regarding variances (*supra*). Therefore, the Department's decision denying the petitioner the time requested for eating must

also be reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No.  
1000.4D.

# # #